

Before the
Federal Communications Commission
Washington, D.C. 20554

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OCT 21 2002

In the Matter of)	
)	
Implementation of the Telecommunications)	CC Docket No. 96-115
Act of 1996:)	
)	
Telecommunications Carriers' Use of)	
Customer Propriety Network Information)	
And Other Customer Information;)	
)	
Implementation of the Non-Accounting)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the)	
Communications Act of 1934, As Amended)	
)	
2000 Biennial Regulatory Review --)	
Review of Policies and Rules Concerning)	CC Docket No. 00-257
Unauthorized Changes of Consumers')	
Long Distance Carriers)	

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PETITION FOR RECONSIDERATION OF AMERICA ONLINE, INC.

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TABLE OF CONTENTS

<u>Introduction and Summary</u>	2
<u>Discussion</u>	3
I. The <i>Third</i> R&O Wrongly Allows Wireline Carriers To Use Competitively Sensitive CPNI For All “Communications-Related” Activities, Including Information Services	5
II. The <i>Third</i> R&O Wrongly Permits Use of Competitively Sensitive CPNI For Any Third-party Joint Venturer for Any “Communications-Related” Purpose	7
III. CPNI Rules Must Ensure That Competitively Sensitive Information of Unaffiliated ISPs And Their Customers is Not Used to Market Incumbent LEC ISP Services	9
<u>Conclusion</u>	11

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PETITION FOR RECONSIDERATION

America Online, Inc. ("AOL"), pursuant to Section 1.429(a) of the FCC rules, 47 C.F.R. §1.429(a), files this Petition for Reconsideration of the Third Report and Order¹ in the above-captioned proceedings. **As** described herein, the *Third R&O* impermissibly allows wireline carriers to use customer propriety network information ("CPNI")² in a manner that is contrary to Sections 201, 202 and 222 of the Communications Act, substantially impairing information services competition.

¹ Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860 (2000) ("*Third R&O*").

² In this petition, AOL refers specifically to CPNT as defined in Section 222(f)(1) of the Communications Act. 47 U.S.C. § 222(f)(1).

Introduction and Summary

As the nation's largest provider of Internet and online services, AOL has a significant interest in the Commission's rules governing how carriers, including ISP affiliates and/or joint venturers of carriers use CPNI for competitive purposes in the information services market. AOL provides CPNI to wireline carriers in a myriad of ways, such as when AOL orders telecommunications service for its own use, when it acts as agent for AOL members to order telecommunications services, or when it orders DSL telecommunications services as inputs to AOL's DSL-based Internet access services. Similarly, wireline carriers today have access to the CPNI of AOL's members when they dial-in to AOL, call AOL for customer service, or order upgrades or additions to their services. Moreover, the fact remains that AOL and other ISPs, as well as ISP customers, have no effective choice but to communicate via the incumbent LEC local access networks, and so unaffiliated ISPs continue to deliver without real choice enormous amounts of CPNI to these carriers.'

The *Third R&O* has unlawfully expanded wireline carrier use of competitively sensitive CPNI contrary to the Commission's approach on CPNI adopted in this docket.⁴ The potential for anticompetitive abuse is significant and real. For example, under the *Third R&O*, it would appear that Microsoft, already a "joint venturer" with Verizon and Qwest,⁵ or other ISPs or

³ FCC Statistics of Communications Common Carriers, at 187, Table 5.1 (Sept. 24, 2002) (ILECs control 92.9% of total access loops).

⁴ In the Matter of Implementation of the Telecommunications Act of 1996, et al., Second Report and Order, 13 FCC Rcd. 8061 (1998) ("*Second R&O*"), as modified by, In the Matter of Implementation of the Telecommunications Act of 1996, et al., Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd. 14409 (1999) ("*Order on Reconsideration*"),

⁵ Qwest Press Release, "Qwest Communications Announces Multimillion Dollar Agreement to Provide Internet Access for MSN" (May 17, 2000); Qwest Press Release, "Qwest Communications and MSN Join Efforts to Deliver Powerful Broadband Solutions to Consumers"

entities, could obtain access to and use the CPNI of consumers dialing into a competing ISP's narrowband services or ordering other services. Such use is contrary to the very core of the Section 222 privacy and competitive safeguards. Further, as explained below, these expansions were done without adequate opportunity for notice and comment required by the Administrative Procedure Act, 5 U.S.C. § 553(b).

AOL urges the Commission to reconsider the *Third R&O* to reflect more appropriately the need for competitive CPNI safeguards for unaffiliated ISPs competing with wireline carrier ISP affiliates and "joint venturers." Instead, the FCC should ensure that ILECs, their affiliates and joint venturers, may not skew competition in the provision of information services by abusing the CPNI of competing ISPs and their customers.

Discussion

The Commission has long recognized that the exploitation of CPNI by incumbent LECs for marketing affiliated ISP services can create an unfair and detrimental advantage in the competitive ISP marketplace.⁶ Indeed, while finding that *Computer III* CPNI precedent was "fully supplant[ed]" by Section 222, the Commission previously and expressly adopted new CPNI regulations to address "carrier incentives to use CPNI for marketing purposes as well as

(August 17, 2001); Verizon Press Release, "Companies Will Combine World-Class MSN Services and Content with Verixon Online's State-of-the-Art DSL Network to Transform Customers' Broadband Experience" (June 20, 2002) ("VZ-MSN Release").

⁶ *In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, Report and Order*, 6 FCC Rcd. 7571, 7609, ¶ 84 (1991). ("The CPNI rules for enhanced services were intended to balance considerations of efficiency, competitive equity and privacy. Having had the opportunity to monitor the operation of the CPNI rules since their adoption, we now conclude that a change in those rules is appropriate to better balance these three important interests. Accordingly we will require that, for customers with more than twenty lines, BOC personnel involved in marketing enhanced services obtain written authorization from the customer before gaining access to its CPNI.").

the potential for anticompetitive behavior.”⁷ Even after the *U.S. West*⁸ decision, the Commission delivered further assurance in the *Order on Reconsideration*, holding that ILECs may not use CPNI to market Internet access services.” Yet, without explanation for the reversal, the *Third R&O* takes away the competitive safeguards by allowing wireline carriers to market CPNI for any “communications-related” information service” and to permit CPNI access to any third-party “joint venturers.”¹¹

Further, the Commission has also recognized, for both narrowband and broadband services, that ISPs order incumbent LEC telecommunications services on behalf of the end user.¹² The CPNI associated with such orders and how the CPNI rules function in this context, however, appears to be largely forgotten in the *Third R&O*. Because such competitively sensitive CPNI may be subject to incumbent LEC abuses, the Commission should provide for additional protections and clarifications.

⁷ *Second R&O*, ¶ 193.

⁸ *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000). Significantly, while the court questioned the primary purposes of Section 222, it ultimately held that the promotion of competition would be “considered in concert with the government’s interest in protecting consumer privacy.” *Id.*, 1237.

⁹ *Order on Reconsideration*, ¶¶ 54-55.

¹⁰ *Third R&O*, ¶¶ 32-44; 47 C.F.R. § 64.2007(b)(1).

¹¹ *Id.*, ¶ 45-49; 47 C.F.R. § 64.2007(b)(2).

¹² See, e.g., *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd. 19237 (1999) (Under bulk DSL arrangements, ISPs send orders for DSL service to ILECs in the provision of high-speed Internet access to end users); *In the Matter of Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 5 FCC Rcd. 3103, 3106, ¶¶ 20-23 (1990) (discussing how ISPs order telecommunications services from BOCs on the end user’s behalf and as the end user’s agent), as modified by, Memorandum Opinion and Order, 6 FCC Rcd. 7646 (FCC 91-382) ¶¶ 56-57 (1991) (noting that ISPs purchase certain telecommunications services from BOCs “on behalf their customers.”).

I. The *Third R&O* Wrongly Allows Wireline Carriers To Use Competitively Sensitive CPNI For All “Communications-Related” Activities, Including Information Services

While the *Third R&O* (§ 36) concludes “that targeted marketing of communications-related services using CPNI by the carrier that collects it is within the range of reasonable customer expectations,” the Commission has failed to provide an adequate rationale for the language of the rule, which expands “communications-related services” to include “information services typically provided by telecommunications carriers.”¹³ Indeed, this rule language contradicts findings of the *Order on Reconsideration* without any effort to explain this contradiction, or to demonstrate that it is supported in the record

The *Order on Reconsideration* found that, at least for Internet access services, “there is no evidence, currently, that consumers expect to receive such services from their wireline provider, or that they expect to use such services in the way that they expect to receive or use more integrated services.”¹⁴ Obviously, consumers do not expect to receive Internet access solely or primarily from the incumbent LECs because other competitive ISPs, including AOL, are providing such services in a healthy and competitive ISP market. The *Third R&O*, however, cites no new evidence to overturn this finding. In addition, the *Order on Reconsideration* expressly recognized the costs to ISP competition if carriers misuse CPNI. Specifically, the Commission held:

The ability to use CPNI from an existing service relationship to market new services to a customer bestows an enormous competitive advantage for those carriers that currently have a service relationship with customers, particularly incumbent exchange carriers This, in turn, poses a significant risk to the development of competition Because of

¹³ 47 C.F.R. § 64.2003(b) (“The term ‘communications-related services’ means telecommunications services, information services typically provided by telecommunications carriers, and services related to the provision or maintenance of customer premises equipment.”).

¹⁴ *Order on Reconsideration*, ¶ 29.

the competitive advantage that many BOCs retain, we concluded that we would not remove certain safeguards designed to protect against BOC discrimination despite the competitive ISP marketplace. We reach a similar conclusion here: *giving wireline carriers, particularly ILECs, the right to use CPNI without affirmative customer approval to market Internet access services could damage the competitive Internet access market at this point in time.*¹⁵

Without any discussion of the impact on Internet access competition, however, the *Third R&O* now permits wireline carriers, especially the ILECs (who have access to the most customer information), to market Internet access using the customer's CPNI.¹⁶ The Commission has crossed from the "tolerably terse" to the "intolerably mute" because the *Third R&O* neither recognizes that significant policy shift from the *Order on Reconsideration* nor does it provide any reasoned justification for it.

Finally, although the Commission is compelled by the Court to draw CPNI regulations more clearly and based on record findings in this proceeding,¹⁸ the *Third R&O* does not discuss the meaning of "communications-related services." The language of the rule is quite ambiguous. For example, there is no constraint on a carrier's self-interpretation of the rule language, "information services typically provided by telecommunications carriers," including a description of exactly what services are "typically" provided." Thus, the *Third R&O* leaves the

¹⁵ *Id.*, ¶ 55 (emphasis added)

¹⁶ AOL incorporates by reference herein its Comments filed in the Commission's Third Further Notice regarding the need for clarification of rules to protect competitively-sensitive CPNI submitted to wireline carriers by ISPs (including orders submitted on the end user's behalf). Comments of AOL, CC Dkt. No. 96-1 15 at 3-6 (Oct. 21, 2002).

¹⁷ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841,852 (1970).

¹⁸ *US West*, 182 F.3d at 1238-1239.

¹⁹ Moreover, while the *Third R&O* (¶ 36) indicates that the CPNI uses would be limited to carriers' "targeted notices" to consumers, the rule actually adopted, Section 64.2007(b)(1),

carrier with an unacceptable level of ambiguity by which to abuse CPNI and impair ISP competition.

II. The *Third R&O* Wrongly Permits Use of Competitively Sensitive CPNI For Any Third-Party Joint Venturer for Any “Communications-Related” Purpose

While the *Third R&O* (§§ 45-49) permits carriers to disclose competitively sensitive CPNI to a third party with whom the carrier is engaged in a communications-related joint venture, this decision makes little sense given the lack of Commission authority over such third-party venturers and the inability to enforce CPNI restrictions, as well as the encouragement of carrier discrimination favoring one “joint venture” TSP competitor to the detriment of all other ISP competitors. Moreover, the adoption of this “joint venture” rule was particularly inappropriate because of the complete absence of notice of the proposal and opportunity for public comment and input

As the *Third R&O* (§30) indicates, it is questionable whether the Commission could effectively enforce CPNI regulations in the face of potential abuses by these third parties. First, because a “joint venture” may be defined in extremely vague terms,²⁰ the nature of the

contains no such restraints on carrier uses to only “targeted” marketing or merely to consumer “notices.”

²⁰See, Black’s Law Dictionary, 5th Ed. at 753 (1979) (“joint venture: A legal entity in the nature of a partnership engaged in the joint prosecution of a particular transactions for mutual profit . . . An association of persons jointly undertaking some commercial enterprise. . . . A one-time grouping of two or more persons in a business undertaking. Unlike a partnership, a joint venture does not entail a continuing relationship among parties.”); see, Fletcher Cyclopedia Corporations, Vol. 6, § 2520 (1996) (discussing differences between corporations, partnerships, and joint ventures); see *Shell Oil v. Prestidge*, 249 F.2d 413, 415-416 (5th Cir. 1957) (in joint venture, “[c]ontribution by the parties of property, money, efforts skill or knowledge to the common enterprise is also essential, but their contribution need not be equal or of the same character.”); *Sasportes v. M/V Sol de Copacabana*, 581 F.2d 1204, 1208 (5th Cir. 1978) (“...the definition of ‘joint venture’ will vary with the context.”); *W.S.A., Inc. v. Liberty Mut. Ins. Co.*, 7 F.3d 788, 792 (8th Cir. 1993) (“...equal control over every aspect of the project is not required...it

relationship between the third party and the carrier would provide no assurance that the carrier would or could control the CPNI or, indeed, would even have knowledge of any CPNI abuses of the third party. Second, it is doubtful that the Commission would have jurisdiction to enforce CPNI rules against joint venturers, either because they do not offer carrier services within the FCC's jurisdiction or they are foreign entities. In such cases, CPNI abuse may occur with impunity and without abatement, while the carrier may also avoid liability through the execution of the confidentiality agreement with appropriate "joint venture safeguards" language.²¹

In addition, by affording the carrier the ability to share CPNI with one or more preferred "joint venturers," the *Third R&O* encourages carriers to engage in favoritism and discriminatory activity that is repugnant to Title II common carrier obligations.²² Thus, the *Third R&O* provides carriers with additional incentive to select one third party vendor for certain information services and then to engage in discrimination against all other competitors, in dereliction of its duties to treat all information service customers in a just, reasonable and nondiscriminatory manner. 47 U.S.C. §§ 201, 202. As the Commission has noted in implementing Section 222, "section 201(b) remains fully applicable where it is demonstrated that carrier behavior is unreasonable or anticompetitive" and a carrier's CPNI disclosure, or lack of disclosure, practices "may well . . .

is permissible for joint venturers to surrender control over some aspects of the project to the other joint venturer without defeating the joint venture.").

²¹ While the *Third R&O* (n. 124) notes that Section 403 of the Communications Act permits an inquiry where a confidentiality agreement has been violated, it is unclear what, if anything, the carrier has violated if it follows the "joint venture safeguards" under confidentiality agreement but the third party venturer abuses the CPNI. Nor does such Section 403 authority bring the Commission any closer to jurisdiction over entities that are outside its authority.

²² According to Verizon, it intends to favor MSN service for DSL. *See*, VZ-MSN Press Release at 1 ("the cobranded Verizon Online with MSN service will become the preferred Internet service offered to all new and existing Verizon Online DSL customers.").

constitute an unreasonable practice in violation of section 201(b).”²³ Indeed, the Commission has recently admonished carriers that unreasonable practices of preferring one ISP to another, or the carrier itself, violate Sections 201 and 202 of the Act.²⁴ Such preferences run contrary to the mandates of Section 230(b) for an Internet unfettered by government regulation and contrary to the Commission’s *Computer Inquiry* policies for open competition in information services that does not prohibit or discourage any market participants.²⁵

Finally, AOL believes that, at a minimum, the issues surrounding the “joint venturer” with access to and use of carrier CPNI deserve a fair hearing of public comment. The *Second Further Notice of Proposed Rulemaking*, however, did not provide adequate notice of a proposed rule change or seek comment on third-party “joint venturer” use of CPNI on an opt-out basis.²⁶

III. CPNI Rules Must Ensure That Competitively Sensitive Information of Unaffiliated ISPs And Their Customers is Not Used to Market Incumbent LEC ISP Services

The FCC has recognized repeatedly that ISPs act as agent for end users or order telecommunications services in bulk from incumbent LECs in the process of delivering competitive information service choices to end users.²⁷ Thus, the ISP that interacts with the ILEC and that provides the CPNI, such as ordering information, regarding the information

²³ *Second R&O*, ¶ 85.

²⁴ *Policy and rules Concerning the Interstate, Interexchange Marketplace, et al., Report and Order*, 16 FCC Rcd. 7418, ¶ 46 (2001) (“The internet service providers require ADSL service to offer competitive internet access service. We take this issue seriously, and note that all carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other enhanced service providers”).

²⁵ 47 U.S.C. § 230(b).

²⁶ *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1140-43 (D.C. Cir. 1995) (FCC’s final order is vacated where final rule was not a “logical outgrowth” of its notice for comment in violation of APA obligations under 5 U.S.C. § 553(b)).

²⁷ *See*, n. 12, above.

service choices of the ISP's end user. The end user, in such cases, does not make an ordering decision, including a CPNI decision (i.e., opt-in or opt-out) with the ILEC; rather it orders the information service directly from the ISP.

In such cases, an important premise of the *Third R&O* must be modified to underscore the importance of CPNI rules regarding competitively sensitive information. First, the ISP, and not the carrier, has established a customer relationship with the end user. For example, when the end user orders DSL-based high-speed Internet access service from AOL, it is AOL that holds the customer's information. While AOL provides some of that information to the ILEC in the form of an order for DSL transport service, the customer has not initiated a relationship with the ILEC for purposes of the provision of DSL. Therefore, the ILEC should have no right to use the CPNI derived from that DSL order for purposes of selling the end user a competing Internet access service, or sharing that DSL order information with its joint venturers. The *Third R&O*, however, avoids these issues – it fails to consider how these ordering relationships (despite FCC precedent recognizing them) change the nature carrier's relationship with the end user and it fails to ISP consider how ISP competition may be undermined without due regard for these relationships

While AOL is also filing comments on the use of competitively sensitive CPNI in the *Third Further Notice* proceeding, AOL strongly believes that it is not sufficient for the *Third R&O* to adopt a permissive CPNI approach for the benefit of ILECs in the provision of information services and avoid addressing the competitive impact of those decisions. It is not

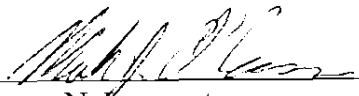
enough for the Commission to forestall resolution of this issue, once again,²⁸ until it is addressed at some time in the indefinite future.

Conclusion

For the reasons stated above, AOL urges the Commission to reconsider the *Third R&O* to ensure that wireline carriers, especially incumbent LECs, do not misuse CPNI of unaffiliated ISPs and their customers to impair the vibrant market for information services.

Respectfully submitted,

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²⁸ The FCC has requested comment on competitively sensitive CPNI since 1998, but has yet to act with affirmative safeguards on the matter. *Second R&O*, ¶ 206 (seeking comment on safeguards needed to protect “competitively-sensitive” information of ISPs when carrier acts as wholesale provider).

Certificate of Service

I, Sybil A. Strimbu, state that copies of the foregoing "Petition for Reconsideration" of America Online, Inc. were delivered by hand or sent by regular mail, this day, October 21, 2002 to the following:

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